

Spring 1999

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### Recommended Citation

Richard A. Hill, *Credit Opportunities, Race, and Presumptions: Does the McDonnell Douglas Framework Apply in Fair Lending Cases*, 64 Mo. L. REV. (1999)

Available at: <https://scholarship.law.missouri.edu/mlr/vol64/iss2/6>

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# Credit Opportunities, Race, and Presumptions: Does the *McDonnell Douglas* Framework Apply in Fair Lending Cases?

*Latimore v. Citibank Federal Savings Bank*<sup>1</sup>

## I. INTRODUCTION

Congress has recognized that “[i]n a credit oriented society such as ours, impediments to sources of credit based on extraneous factors such as race, color, religion, age, sex, marital status, and the like, have a deleterious effect on both the individual victims of discrimination, and on the economy as a whole.”<sup>2</sup> Minority borrowers feel the impact of credit discrimination. “They make me feel like I was wasting my time. Like I wasn’t worthy of being a home owner.”<sup>3</sup> Lenders often do not realize what they have done. “The discrimination in mortgage lending with which I’ve become familiar is not necessarily malicious or abusive. Indeed, in many cases, it’s often unconscious. It, nevertheless, has been found to exist and is generally embodied in some sort of unfounded reluctance to engage in mortgage lending in certain neighborhoods.”<sup>4</sup>

Credit is the access code to mobility, but what happens when an individual’s access is denied? Congress has enacted several statutes to deal with this problem, but case law is not clear on how to prove a credit discrimination case. This Note will explore three options to prove a *prima facie* credit discrimination case. To reach that end, this Note will briefly explore legislative acts to prevent credit discrimination and why Congress enacted them, the *McDonnell Douglas* framework for discrimination cases, and other methods to prove discrimination in mortgage lending. Finally, this Note will examine the current circuit split and offer proposed solutions to this disagreement.

## II. FACTS AND HOLDING

Helen Latimore, a resident of a predominantly African-American, south side Chicago neighborhood, needed a loan.<sup>5</sup> Using the home she owned as

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1. 151 F.3d 712 (7th Cir. 1998).

2. *Amendment of the Equal Credit Opportunity Act and the Truth in Lending Act: Hearings on S. 483, S. 1900, S. 1927, S. 1961 and H.R. 5616 Before the Subcomm. on Consumer Affairs of the Comm. on Banking, Housing and Urban Affairs, 94th Cong. (1975)* (testimony of J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division, Department of Justice).

3. Bernard Parker, Co-Chair, Ad Hoc Coalition of Fair Banking Practices in Detroit, *1989 Hearing*, at 140 (quoting a rejected loan applicant).

4. S. REP. NO. 101-461 (1990), available in 1990 WL 201711, at \*10.

5. See *Latimore*, 151 F.3d at 713.

collateral, she asked Citibank for fifty-one thousand dollars.<sup>6</sup> While she satisfied Citibank's creditworthiness standards, she fell short of the bank's required seventy-five percent security-to-loan ratio.<sup>7</sup>

Dissatisfied with the bank's forty-five thousand dollar appraisal of her home, Latimore offered an earlier appraisal valuing the property at eighty-two thousand dollars, which the account executive, Lundberg, forwarded to the bank's appraisal review department.<sup>8</sup> The appraisal review department would not accept the eighty-two thousand dollar appraisal because the comparable sales, in its view, were not comparable.<sup>9</sup> After failing this review, Citibank denied Latimore the loan.<sup>10</sup>

Latimore then received the loan she needed from a second bank. This bank granted the loan on a lower principal and higher interest rate based on a seventy-nine thousand dollar appraisal.<sup>11</sup>

Naming Citibank and two of its employees as defendants, Helen Latimore filed a credit discrimination suit and requested damages under "an assortment of federal civil rights laws," but primarily under the Equal Credit Opportunity Act (ECOA) and the Fair Housing Act (FHA).<sup>12</sup> At the district court level, Citibank

6. See *Latimore v. Citibank Fed. Sav. Bank*, 151 F.3d 712, 713 (7th Cir. 1998).

7. See *id.* Citibank requires that the loan amount not exceed 75% of the collateral's value, in this case the value of the plaintiff's house. *Id.* Citibank defines the ratio on their web page as follows: "An LTV, or Loan-to-Value, is a ratio of the amount of the mortgage to the value of the home. For example, if your home is worth \$100,000 and your mortgage is \$80,000, your loan-to-value ratio is 80% (your loan is 80% of the value of your home)." CitiBank, *Frequently Asked Questions* <<http://www.citibank.com/mortgage/faq.htm>>.

8. See *Latimore*, 151 F.3d at 713. Mr. Kernbauer's, the bank's appraiser and a named defendant in the suit, appraisal produced "a loan-to-value ratio of 113 percent." *Id.*

9. See *id.* The department declined the appraisal because the comparable properties were more than six blocks from the plaintiff's. See *id.*

10. See *id.*

11. See *Latimore v. Citibank Fed. Sav. Bank*, 151 F.3d 712, 713 (7th Cir. 1998). The second bank loaned the plaintiff \$46,000 at "one percent higher interest." *Id.*

12. *Id.* The two employees named in the action were Marcia Lunberg, the account executive, and Ed Kernbauer, the appraiser. The damages included additional interest and "certain consequential damages." *Id.*

The Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f (1994), provides: "It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction-- (1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract) . . . ." 15 U.S.C. § 1691(a)(1) (1994).

The Fair Housing Act, 42 U.S.C. §§ 3601-3631 (1994), provides:

It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex,

successfully moved for summary judgment.<sup>13</sup> In her appeal to the Seventh Circuit Court of Appeals, Latimore questioned the quantity of evidence required for a plaintiff's prima facie credit discrimination case to weather summary judgment.<sup>14</sup> Latimore argued that she was entitled to use the *McDonnell Douglas*<sup>15</sup> presumption of discrimination.<sup>16</sup> She argued that to shift the burden to Citibank, she only needed to show "that her house was in a minority neighborhood, [that] an appraisal estimated the value of the house to be at least as great as the loan, [that she] was creditworthy, [and that]. . . the loan was rejected."<sup>17</sup>

In an unrelated argument, Latimore alleged that white borrowers received preferential treatment at the hands of Lundberg and Citibank.<sup>18</sup> Specifically, when similarly situated white borrowers—those who desired like amounts and possessed property equivalent in value—fell short on appraisals, Lundberg would encourage those prospective borrowers to provide more "comparables" to the bank's appraiser.<sup>19</sup>

Citibank also offered *McDonnell Douglas* as the standard in credit discrimination cases.<sup>20</sup> In a self-serving proposal, Citibank argued that Latimore's showing must include creditworthiness and satisfactory collateral value under the bank's measure.<sup>21</sup> While Latimore was creditworthy, she could not meet the appraisal standard.<sup>22</sup>

Considering the evidence in a light most favorable to Latimore, Judge Richard Posner, writing for the panel, concluded that "no reasonable jury could find that she, Latimore, was turned down because of her race," and affirmed the district court's grant of summary judgment in favor of Citibank.<sup>23</sup> In its affirmation, the court held that the *McDonnell Douglas* framework is unsuitable

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handicap, familial status, or national origin.

42 U.S.C. § 3605(2) (1994). "[T]he term 'residential real estate-related transaction' means any of the following: (1) The making or purchasing of loans or providing other financial assistance— (A) for purchasing, constructing, improving, repairing, or maintaining a dwelling; or (B) secured by residential real estate. (2) The selling, brokering, or appraising of residential real property." 42 U.S.C. § 3605(b)(1)-(2) (1994).

13. See *Latimore*, 151 F.3d at 713.

14. See *id.*

15. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

16. See *id.* at 713-14. For a discussion of the discrimination test in *McDonnell Douglas*, see *infra* notes 61-69 and accompanying text.

17. *Latimore v. Citibank Fed. Sav. Bank*, 151 F.3d 712, 715 (7th Cir. 1998).

18. See *id.*

19. *Id.* at 715-16.

20. See *id.* at 713.

21. See *id.* at 714.

22. *Latimore v. Citibank Fed. Sav. Bank*, 151 F.3d 712, 714 (7th Cir. 1998).

23. *Id.* at 716.

for credit discrimination cases because no basis exists to compare the plaintiff's treatment with the "defendant's treatment of other, similarly situated persons."<sup>24</sup>

### III. LEGAL BACKGROUND

#### A. Discrimination Statistics and Forms

A brief look at lending statistics proves helpful in uncovering the pressing need for government action to prevent lending discrimination. Bill Dedman, a staff writer for the Atlanta Journal-Constitution, studied savings-and-loan (S&L) statistics from 1983 to 1988.<sup>25</sup> Three-thousand one hundred S&Ls accepted ten million loan applications over the five year period, which resulted in fifty percent of all home loans in the United States.<sup>26</sup> The results of this survey produced some disturbing statistics. The study showed that African-Americans received loans half as often as whites.<sup>27</sup> In addition to the disproportionate rejection rate, African-Americans withdrew "applications 21 percent more often and receive[d] no decision on loan applications 23 percent more often."<sup>28</sup> Summing up the statistics, the study showed that African-Americans received loans fifty percent of the time, as opposed to sixty-five percent for whites.<sup>29</sup>

By race, the national statistics for rejections are alarming: rejection rates for whites, 11.1%; Asians, 12.2%; American Indians, 16.5%; Hispanics, 18.2%; and African-Americans, 23.7%.<sup>30</sup> African-Americans in the Midwest and plains states enjoy the highest incomes relative to whites in the nation, but S&Ls rejected them for home loans at a greater rate than anywhere in the nation (Plains: white, 12.6%; African-American, 30.9%. Midwest: white, 12.2%; African-American, 29.6%).<sup>31</sup>

Looking at these statistics, one could assume that the higher rejection rates were simply a function of income, but the study showed contrary data. In eighty-five out of one hundred of the largest metropolitan areas surveyed, low income whites received loans more often than high income blacks in one of the five years during the study.<sup>32</sup> In three of the five years, thirty-five of one hundred metropolitan areas produced this result.<sup>33</sup>

24. *Id.* at 714.

25. Bill Dedman, *Blacks Turned Down for Home Loans From S&Ls Twice as Often as Whites*, ATLANTA J. & CONST., Jan. 22, 1989, at A01.

26. *See id.*

27. *See id.*

28. *Id.*

29. *See id.*

30. *See id.*

31. *See id.*

32. *See id.*

33. *See id.*

Discrimination does not begin when a potential borrower hands over his loan application. Rather, discriminatory practices begin when lenders market their services. Lenders may "fail[] to provide . . . different information or services regarding . . . aspect[s] of the lending process."<sup>34</sup> Alternatively, lenders may "discourage[] or selectively encourage[] applicants with respect . . . [to] applications for credit."<sup>35</sup>

The United States brought its first ECOA/FHA action for credit discrimination against Decatur Federal Savings & Loan Association.<sup>36</sup> Alleging a "policy or practice" of discrimination, the government entered into a consent decree with Decatur for its "practice of marketing services and products almost exclusively to white residents of the Atlanta area."<sup>37</sup>

Notwithstanding ECOA and FHA, lenders continued to discriminate based on race due to "segregated housing patterns and the deterioration of urban ghetto neighborhoods."<sup>38</sup> Redlining placed the decision to make a loan not on the "creditworthiness of the individual applicant or the soundness of the [collateral], but on the . . . subjective judgment . . . of the lender that the neighborhood may be declining."<sup>39</sup>

In *United States v. Blackpipe State Bank*,<sup>40</sup> the United States brought an action against a bank for denying loans where the collateral was located on Indian reservations, for requiring greater collateral for "Native Americans than similarly situated white applicants, and [for] denial of applications when similarly situated whites were approved."<sup>41</sup> The bank entered into a consent decree to remedy the discriminatory practices.<sup>42</sup>

By "refusing to extend credit or [use] different standards in determining whether to extend credit," lenders' discrimination is evident through a differential in denial rates.<sup>43</sup> These differentials often manifest themselves through subjective criteria for application evaluation.<sup>44</sup> For example, in *United States v. Shawmut Mortgage Co.*,<sup>45</sup> the Justice Department alleged that

34. Robert G. Schwemm, *A Fair Lending Symposium: Litigating a Mortgage Lending Case, Introduction to Mortgage Lending Discrimination Law*, 28 J. MARSHALL L. REV. 317, 327 (1995).

35. *Id.*

36. See Kathleen E. Keest, *Residential Mortgage Litigation: Credit Discrimination*, 989 PLI/CORP. 569, 596 (1997) (citing *United States v. Decatur Fed. Sav. & Loan Ass'n*, Civ. No. 1:92-CV-2198 (N.D. Ga. 1992)).

37. *Id.* at 596-97.

38. DEE PRIDGEN, CONSUMER CREDIT AND THE LAW 3-23 (1990).

39. *Id.* (quoting H.R. REP. NO. 94-562, at 12 (1975), *reprinted in* 1975 U.S.C.C.A.N. 2313).

40. Civ. No. 93-5115 (D.S.D. 1994), *cited in* Keest, *supra* note 36, at 597.

41. Keest, *supra* note 36, at 597.

42. See Keest, *supra* note 36, at 598.

43. Schwemm, *supra* note 34, at 327.

44. See Keest, *supra* note 36, at 598.

45. Civ. No. 3:93-CV-2453 (avc) (D. Conn. 1993), Clearinghouse No. 49,953A

underwriters and loan officers held far too much discretion in their ability to accept supplemental data when considering a marginal loan.<sup>46</sup> This discretion, combined with Shawmut's denial statistics, indicated some level of discrimination against African-American and Hispanic applicants.<sup>47</sup>

Assigning different interest rates, costs, and loan terms based on protected status also qualifies as discriminatory lending.<sup>48</sup> For example, the First National Bank of Vicksburg faced Justice Department charges of assessing a four to eleven percent higher interest rate for African-American home improvement borrowers as compared to similarly situated white borrowers.<sup>49</sup>

Even though discrimination begins before the loan is processed, it may continue after the loan is made. If a lender applies different standards based on a protected status when "servicing . . . or invoking default remedies," the lender violates provisions of ECOA and FHA.<sup>50</sup> An example of this practice might include differentials in a lender's default declaration practices or in allowing opportunities to cure defaults based on race or other status.<sup>51</sup>

### B. Statutes and Frameworks

Congress introduced the Fair Housing Act (FHA) in 1968.<sup>52</sup> Responding to urban riots in 1967 and perceived housing discrimination problems, Congress prohibited discrimination in "residential real estate-related transactions" because of "race, color, religion, sex, handicap, family status, or national origin."<sup>53</sup> While the FHA was expected to be a strong performer, the early years fell short of expectations and did not quickly result in a strong body of lending discrimination cases.<sup>54</sup>

Within a decade, Congress passed the Equal Credit Opportunity Act (ECOA) which banned "discrimination in all types of credit transactions."<sup>55</sup> In 1976, Congress amended this Act to include race along with its previous restrictions against sex and marital status discrimination.<sup>56</sup> During the 1976 amendment process, Congress directly addressed the burden of proof issue in

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(complaint), 49,953B (consent decree).

46. See Keest, *supra* note 36, at 598.

47. See Keest, *supra* note 36, at 598.

48. See Keest, *supra* note 36, at 599; Schwemm, *supra* note 34, at 326.

49. See Keest, *supra* note 36, at 599 (citing *United States v. First Nat'l Bank*, Civ. No. 5:94-CV- 6(b)(n) (S.D. Miss. 1994), Clearinghouse No. 49,954A (complaint) 49,954B (consent decree).

50. Schwemm, *supra* note 34, at 327.

51. See Schwemm, *supra* note 34, at 326.

52. See Schwemm, *supra* note 34, at 317.

53. 42 U.S.C. § 3605(a), (b) (1994).

54. See Schwemm, *supra* note 34, at 318.

55. Schwemm, *supra* note 34, at 318.

56. See Schwemm, *supra* note 34, at 318.

cases of discriminatory lending practices with disparate effects.<sup>57</sup> The Senate Report states that “judicial constructions of anti-discrimination legislation in the employment field, in cases such as *Griggs v. Duke Power Co.*<sup>58</sup> and *Albemarle Paper Co. v. Moody*,<sup>59</sup> are intended to serve as guides in the application of this act.”<sup>60</sup> Unfortunately, the evidentiary standard for disparate treatment cases set forth in *McDonnell Douglas v. Green*<sup>61</sup> is notably absent in this legislation. Ample writings on and citations to *McDonnell Douglas* do, however, exist. This section will briefly describe the framework of this standard and its development over the past twenty-five years. Under the framework, the plaintiff holds the initial burden in a Title VII discrimination complaint.<sup>62</sup> To carry this burden, the plaintiff must show:

- (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.<sup>63</sup>

If the plaintiff’s burden is met, the burden then shifts to “the employer to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.”<sup>64</sup> While the employer’s burden is “exceedingly light,”<sup>65</sup> the representation must be “clear and reasonably specific.”<sup>66</sup>

If the employer presents a convincing argument to answer the plaintiff’s allegations, the presumption then disappears and the plaintiff must show that the “proffered reasons are pretextual and that the employment decision was the result of discriminatory intent.”<sup>67</sup> While the Supreme Court is quite clear that intentional discrimination is the “ultimate issue,” if a defendant’s rationale fails to convince the fact finder that a legitimate business practice excluded the

57. See H.R. 6516, 94th Cong. (1975).

58. 401 U.S. 424 (1971). *Griggs* lays out the evidentiary standard for disparate effects cases. See *id.* at 802-05.

59. 422 U.S. 405 (1975).

60. S. R. No. 94-589, at 4 (1976) (citations omitted). Congress codified the *Griggs* holding in the Civil Rights Act of 1991, 42 U.S.C. §§ 2000e to 2000e-2 (1994).

61. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

62. See *id.*

63. *Id.* The Court noted that variations in Title VII fact patterns may alter the specific facts required for a prima facie case under this test. See *id.* at 802 n.13.

64. *Id.* at 802.

65. *Batey v. Stone*, 24 F.3d 1330, 1334 (11th Cir. 1994).

66. *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 258 (1981).

67. *Rouse v. Farmers State Bank*, 866 F. Supp. 1191, 1205 (N.D. Iowa 1994) (citing *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 510 (1993)).



plaintiff, the jury may infer a discriminatory intent when coupled with the plaintiff's prima facie showing.<sup>68</sup>

Although the *McDonnell Douglas* framework "remains governing law," many courts either short circuit or evade several of its requirements when deciding Title VII cases.<sup>69</sup> In *Lapsley v. Columbia University*,<sup>70</sup> Judge Chin focused on the ultimate issue and strongly criticized the framework as a "yo-yo rule, befuddl[ing], replete with confusion, and incomprehensible."<sup>71</sup> Noting its general usefulness at its inception, Judge Chin contended that the framework's usefulness had eroded over time and continued to do so as the test was further clarified.<sup>72</sup> Judge Chin observed that courts regularly gloss over the first two stages of the test and "then proceed to disregard it, or at least radically simplify it."<sup>73</sup> His research showed that many courts assume *arguendo* satisfaction of the first two prongs, attending only to prong three or simply "presum[ing] a prima facie case has been established."<sup>74</sup>

Judge Chin encouraged wholesale discarding of the framework, as it had "outlived its usefulness," and recommended a two-part "ultimate issue" test.<sup>75</sup>

68. *See id.*

69. *See Lapsley v. Columbia Univ. College of Physicians & Surgeons*, 999 F. Supp. 506, 514 (S.D.N.Y. 1998).

70. 999 F. Supp. 506 (S.D.N.Y. 1998).

71. *Id.* at 513 (quoting *Bickerstaff v. Vassar College*, 992 F. Supp. 372, 373 (S.D.N.Y. 1998) ("yo-yo rule"); Kenneth R. Davis, *The Stumbling Three-Step, Burden-Shifting Approach in Employment Discrimination Cases*, 61 BROOK. L. REV. 703, 707-08 (1995) ("befuddling"); *Shifting Burdens of Proof in Employment Discrimination Litigation*, 109 HARV. L. REV. 1579, 1602 (1996) ("replete with confusion"); *Mullen v. Princess Anne Volunteer Fire Co., Inc.*, 853 F.2d 1130, 1137 (4th Cir. 1988) ("incomprehensible"); *Hagelthorn v. Kennecott Corp.*, 710 F.2d 76, 85 (2d Cir. 1983); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1016 (1st Cir. 1979) ("incomprehensible"). Judge Chin handed down *Shafir v. Association of Reform Zionists of America*, 998 F. Supp. 355 (S.D.N.Y. 1998), on the same day airing the same criticisms of the framework.

72. *See Lapsley*, 999 F. Supp. at 514 (citing *Fisher v. Vassar College*, 114 F.3d 1332, 1335 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 851 (1998)); *see also Quaratino v. Tiffany & Co.*, 71 F.3d 58, 65-66 (2d Cir. 1995) (requiring only minute demonstration under *McDonnell*'s first prong).

73. *Lapsley*, 999 F. Supp. at 515.

74. *Id.* (citing *Piraino v. International Orientation Resources, Inc.*, 137 F.3d 987, 990 n.1 (7th Cir. 1998) ("[T]he district court short-circuited the *McDonnell Douglas* analysis by assuming that [plaintiff] had established a prima facie case and that [defendant] had articulated a nondiscriminatory reason for the action taken."); *Jalal v. Columbia Univ.*, 4 F. Supp. 2d 224, 234 (S.D.N.Y. 1998) (declining to "dance mechanistically through the *McDonnell-Douglas* and *Price Waterhouse* 'minuets'"); *Padob v. Entex Info. Serv.*, 960 F. Supp. 806, 812 (S.D.N.Y. 1997)). For cases on presumptions, *see Bikerstaff*, 992 F. Supp. 372 (S.D.N.Y. 1998); *Jugueta v. Perry*, No. 95 Civ. 10303, 1997 WL 742535, at \*4 (S.D.N.Y. Dec. 1, 1997).

75. *Lapsley v. Columbia Univ. College of Physicians & Surgeons*, 999 F. Supp. 506, 515 (S.D.N.Y. 1998).

First, he would require the plaintiff to prove intentional discrimination by a preponderance of the evidence.<sup>76</sup> Second, he would only require a plaintiff to show that it was more likely than not that illicit motives drove adverse employment decisions where “proof [was] elusive.”<sup>77</sup>

To decide both *Lapsley* and its sister case,<sup>78</sup> Judge Chin deferred to the current rule of law and applied the *McDonnell Douglas* test.<sup>79</sup> He effectively glossed over the framework’s first two prongs and then proceeded directly to the third prong—the ultimate issue.<sup>80</sup>

A number of courts have declined to extend the *McDonnell Douglas* framework into new or expanding areas of the law. In most instances, the courts find either statutorily directed evidentiary standards or a general inapplicability of the framework to the controversy at bar. In *Jordan v. Clay’s Rest Home*,<sup>81</sup> the Virginia Supreme Court refused to extend the *McDonnell Douglas* framework to wrongful discharge claims founded in workers’ compensation retaliation or race discrimination.<sup>82</sup> The plaintiff sought redress for wrongful discharge “because of her race in violation of the public policy of Virginia . . . prohibiting race discrimination in employment.”<sup>83</sup> Following the presentation of “plaintiff’s case-in-chief, the trial court [struck down] the evidence [on] both counts and entered summary judgment for the defendant.”<sup>84</sup>

On appeal, the plaintiff in *Jordan* contended that the “fundamental issue” in the case was whether a minority plaintiff lacking direct evidence of wrongful discharge could prove a claim under the *McDonnell Douglas* burden shifting framework.<sup>85</sup> Citing federal and state cases, the plaintiff sought to extend the framework to both statutory and common law wrongful discharge cases.<sup>86</sup> After reviewing *McDonnell Douglas* and its progeny, the court discussed the appellant’s proposed modification to the *McDonnell Douglas* framework.<sup>87</sup> The plaintiff alleged that a

“plaintiff may establish a prima facie case sufficient to shift the burden of production to the defendant” if the plaintiff establishes by a preponderance of the evidence: (1) that “the plaintiff was black”; (2)

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76. See *id.* at 515-16.

77. *Id.* at 516.

78. *Shafir v. Association of Reform Zionists of America*, 998 F. Supp. 355 (S.D.N.Y. 1998).

79. See *Lapsley*, 999 F. Supp. at 516.

80. See *Shafir*, 998 F. Supp. at 361.

81. 483 S.E.2d 203 (Va. 1997).

82. See *id.* at 207.

83. *Id.* at 204.

84. *Id.*

85. *Jordan v. Clay’s Rest Home*, 483 S.E.2d 203, 205 (Va. 1997).

86. See *id.* at 205-06.

87. See *id.* at 206.

that "the defendant discharged the plaintiff from employment"; (3) that "the plaintiff was satisfactorily performing the job," that is, she "was qualified for the job"; and (4) that "the plaintiff was replaced with a white employee."<sup>88</sup>

After noting Virginia's "strong commitment to the employment-at-will doctrine" and finding its evidentiary and procedural structures for developing a *prima facie* wrongful discharge case appropriate, the court rejected the "plaintiff's invitation to adopt" the framework.<sup>89</sup>

In support of its holding, the court could find no congressional or judicial reference to the employment-at-will doctrine in either Title VII or the line of Supreme Court cases extending the *McDonnell Douglas* test.<sup>90</sup> Further, the court could determine no need for a special burden-shifting rule when plaintiffs are allowed to prove wrongful discharge cases through circumstantial evidence.<sup>91</sup> In sum, the court in *Jordan* could not find a good reason to extend the framework to the contested area of the law.

In a decision regarding the FHA, the United States District Court for the Eastern District of Wisconsin declined to extend the *McDonnell Douglas* framework to the zoning context. In *Lauer Farms, Inc. v. Waushara County Board of Adjustment*,<sup>92</sup> local pickle farmers brought an action seeking relief under the FHA,<sup>93</sup> other federal civil rights laws,<sup>94</sup> and the Wisconsin Open Housing Act.<sup>95</sup> Seeking to purchase property for building migrant worker camps, the farmers alleged that the Board of Adjustment ("the Board") reached its decision not to grant a conditional use permit "bas[ed] . . . on discriminatory reasons."<sup>96</sup> More specifically, the farmers charged that during the first board meeting they heard no objections to their proposal.<sup>97</sup> During subsequent meetings, however, townspeople made "discriminatory remarks and 'inappropriate references to the ethnicity, race, socioeconomic and family status, and the income sources of the expected tenants.'"<sup>98</sup> After the aforementioned use permit denial, the farmers lost the opportunity to purchase the property.<sup>99</sup>

88. *Id.*

89. *Id.* at 207.

90. *Jordan v. Clay's Rest Home*, 483 S.E.2d 203, 207 (Va. 1997).

91. *See id.*

92. 986 F. Supp. 544 (E.D. Wis. 1997).

93. 42 U.S.C. § 3604 (1994).

94. 42 U.S.C. §§ 1982, 1983 (1994).

95. WIS. STAT. ANN. § 106.04 (West 1991) (similar in purpose to the FHA, but additionally prohibits discrimination on the basis of sexual orientation, disability, lawful source of income, age, and ancestry). *See Lauer Farms*, 986 F. Supp. at 546-47.

96. *Lauer Farms*, 986 F. Supp. at 546.

97. *See Lauer Farms v. Waushara County Bd. of Adjustment*, 986 F. Supp. 544, 546 (E.D. Wis. 1997).

98. *Id.*

99. *See id.*

The Board entered a broad motion for summary judgment on the issues of standing and failure to allege facts sufficient to support a racial discrimination claim under the sundry federal and state acts.<sup>100</sup> After dismissing plaintiffs' claims under the civil rights statutes for lack of standing, the court examined the plaintiffs' prima facie case under the FHA.<sup>101</sup>

Attempting to force the plaintiffs into the *McDonnell Douglas* framework, the Board relied heavily on *Gamble v. City of Escondido*,<sup>102</sup> which set out elements for a prima facie case of discrimination due to denial of a conditional use permit by a government actor.<sup>103</sup> The court conducted an analysis of this test under the *McDonnell Douglas* rubric and found that the framework's primary use was where no discriminatory intent was evident, which was the case in *Gamble* and *McDonnell Douglas*.<sup>104</sup> Examining Seventh Circuit precedent, the court found that the burden-shifting framework is appropriate where no "direct proof of discrimination" exists.<sup>105</sup> Noting the other methods for proving a prima facie discrimination case, the court held that where the plaintiffs have alternative evidence, "reliance on the *McDonnell Douglas* analysis is not necessary."<sup>106</sup> The court refused to grant the Board's summary judgment motion with respect to the FHA claim.<sup>107</sup>

The United States District Court for the Northern District of Iowa, in an extremely comprehensive decision in *Rouse v. Farmers State Bank*,<sup>108</sup> also declined to extend the framework into the whistleblower protection arena. The controversy stemmed from allegations that the defendant bank terminated the plaintiff, violating the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA).<sup>109</sup> The plaintiff also claimed he was fired because of his age and that his discharge violated other common law employer-employee principles.<sup>110</sup>

100. See *id.* at 550.

101. See *id.* at 550-54.

102. 104 F.3d 300 (9th Cir.1997).

103. See *id.* at 304.

104. See *id.* at 556-57.

105. *Id.* at 557 (citing *Collier v. Budd Co.*, 66 F.3d 886 (7th Cir. 1995) (age discrimination); *Allen v. Diebold, Inc.*, 33 F.3d 674 (6th Cir. 1994) (age discrimination); *Castleman v. Acme Boot Co.*, 959 F.2d 1417 (7th Cir. 1992) (age discrimination)).

106. *Lauer Farms v. Waushara County Bd. of Adjustment*, 986 F. Supp. 544, 557 (E.D. Wis. 1997).

107. See *id.*

108. 866 F. Supp. 1191 (N.D. Iowa 1994).

109. 12 U.S.C. § 1831j (1994). See *Rouse*, 866 F. Supp. at 1197. FIRREA protects FDIC insured institution's employee's from "discharge or other[] discrimination . . . with respect to compensation, terms conditions, or privileges of employment because the employee . . . provided information to any Federal Banking agency or the Attorney General regarding" violations of laws or regulations, or the gross mismanagement or waste of funds. 12 U.S.C. § 1837j (1994).

110. See *Rouse*, 866 F. Supp. at 1197.

Addressing the burden of proof for establishing the bank's liability under FIRREA, the court engaged in an extensive review of the Eighth Circuit's standard for prima facie showings in employment retaliation disputes.<sup>111</sup> A summary of the Eighth Circuit's procedure is found in *Gaworski v. ITT Commercial Financial Corp.*,<sup>112</sup> which "modifi[ed] . . . the so-called *McDonnell Douglas* factors" to establish a prima facie case for "adverse employment decisions."<sup>113</sup> After a long and thoughtful discussion of the *McDonnell Douglas* framework and FIRREA, the court concluded that a two-prong analysis was appropriate in whistleblower statute cases.<sup>114</sup> Title VII burden-shifting standards found in *McDonnell Douglas* and its offspring did not apply because Congress expressly provided an evidentiary standard in FIRREA.<sup>115</sup>

Reaching a similar result in *Stone & Webster Engineering Corp. v. Herman*,<sup>116</sup> the Eleventh Circuit refused to accept the Secretary of Labor's argument that the framework should apply to the Energy Reorganization Act of 1974.<sup>117</sup> The case involved the transfer and demotion of a worker in the nuclear construction industry.<sup>118</sup> After the employee reported a hazardous work practice, the employer demoted the employee from second lead foreman to foreman and transferred him to duties outside reactor construction.<sup>119</sup>

Observing that Congress intended to place a tough standard on contractors in the nuclear industry, the court ruled that Congress amended these whistleblower statutes to include an evidentiary standard to battle the common practice of "whistleblower harassment" at nuclear facilities.<sup>120</sup> Therefore, the court reasoned that *McDonnell Douglas* and its "innumerable progeny" did not effect the Employee Protection provisions of the Nuclear Whistleblower Protection Act.<sup>121</sup>

111. See *id.* at 1204-08.

112. 17 F.3d 1104 (8th Cir.), *cert. denied*, 513 U.S. 946 (1994).

113. *Rouse v. Farmers State Bank*, 866 F. Supp. 1191, 1204 (N.D. Iowa 1994).

114. See *id.* at 1208. The two prong test included:

(1) the plaintiff must establish a prima facie case of retaliation by showing that his or her disclosures were a contributing factor in adverse employment actions; then (2) the burden of persuasion shifts to the defendant to demonstrate by the high standard of clear and convincing evidence that it would have made the same employment decision in the absence of the plaintiff's disclosures.

*Id.*

115. See *id.*

116. 115 F.3d 1568 (11th Cir. 1997).

117. 42 U.S.C. § 5851 (1994). See *Herman*, 115 F.3d at 1572.

118. See *Herman*, 115 F.3d at 1568-69.

119. See *id.* at 1570.

120. *Id.* at 1572.

121. *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997). See 42 U.S.C. § 5851 (1994).

### *C. The Circuit Split*

The Seventh Circuit in *Latimore* is the most recent court to consider the disparate treatment standard in credit discrimination cases. Unfortunately, its decision is at odds with the two other circuits who have commented on the application of *McDonnell Douglas* in this context. The Supreme Court is silent to date on this issue.

The first case in the Eighth Circuit that applied the *McDonnell Douglas* framework is factually distinguishable from *Latimore*, but acts as a conceptual guidepost for the framework's extension into credit discrimination law. In *United States v. Badgett*,<sup>122</sup> the Department of Housing and Urban Development (HUD) brought an action before an administrative law judge, charging the defendants with discrimination based on family status.<sup>123</sup> Defendant Badgett owned and operated the 156 unit Georgetown Apartments in Little Rock, Arkansas.<sup>124</sup> The owner "had an explicit policy which excluded families with children" from this adult complex.<sup>125</sup> The victim, Donna Mayeaux and her daughter, inquired about residing at Georgetown, but Brittain, Badgett's agent, discouraged the victim through statements which, by the defendant's admission, were intended to deter her from renting an apartment because of her child.<sup>126</sup> Following these statements, Mayeaux complained to HUD.<sup>127</sup> Her complaint resulted in an action.<sup>128</sup> The Eighth Circuit, discussing the evidentiary standard, applied the *McDonnell Douglas* framework.<sup>129</sup> Citing precedent, the court gave deference to HUD's application of the framework to cases under the FHA because of the difficulty in establishing direct proof of discrimination.<sup>130</sup>

In *Ring v. First Interstate Mortgage, Inc.*,<sup>131</sup> the court indicated that the *McDonnell Douglas* standard is appropriate in FHA cases where no direct evidence of discrimination is available.<sup>132</sup> The court pointed out that the framework is flexible and "varies depending upon the facts of the particular

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122. 976 F.2d 1176 (8th Cir. 1992).

123. *See id.* at 1178.

124. *See id.* at 1177.

125. *Id.*

126. *See id.* at 1178. Brittain made statements to the effect: "[T]he complex has no playground equipment, and no other children of the same age, so her daughter would have no playmates." *Id.* Furthermore Brittain refused to show Mayeaux a one bedroom apartment. *Id.*

127. *United States v. Badgett*, 976 F.2d 1176, 1178 (8th Cir. 1992).

128. *See id.*

129. *See id.*

130. *See id.* (citing *HUD v. Blackwell*, 908 F.2d 864 (11th Cir. 1990)).

131. 984 F.2d 924 (8th Cir. 1993).

132. *See id.* at 926-27. The Eighth Circuit decided the case on other grounds.

case" because the "requirement was 'never intended to be rigid, mechanized or ritualistic.'"<sup>133</sup>

The Fifth Circuit first issued an opinion on the *prima facie* case for credit discrimination in *Moore v. United States Department of Agriculture on Behalf of Farmers Home Administration*.<sup>134</sup> Although the court decided the case on other grounds, it indicated in dicta that the framework is appropriate where no direct evidence of discrimination is available to the plaintiff.<sup>135</sup> Similar to the Eighth Circuit's approach in *Ring*, the court limited "mechanical" application of the framework and pointed out that "[i]n the rare situation in which the evidence establishes that a[] [defendant] openly discriminate[d] against an individual it is not necessary to apply the mechanical formula of *McDonnell Douglas* to establish an inference of discrimination."<sup>136</sup>

Recently, in *Simms v. First Gibraltar Bank*,<sup>137</sup> the Fifth Circuit again had cause to review the evidentiary standard for credit discrimination cases. In a complex set of facts, plaintiff Simms complained against the bank for its failure to provide supplemental financing for the transition of Simms' apartment complex to a cooperative housing project in a predominantly minority area.<sup>138</sup> Simms did not pursue the cause under a "redlining" theory,<sup>139</sup> but rather alleged that the bank engaged in discrimination under the FHA by refusing to lend to a co-op that "would be minority-owned."<sup>140</sup> The primary issue was whether Simms presented a *prima facie* case of discrimination under the FHA.<sup>141</sup> Squarely applying the *McDonnell Douglas* framework, the court held that Simms failed to establish sufficient evidence of the framework's third prong in that he offered no proof of poor minority lending habits or "racial bias" on the part of bank employees.<sup>142</sup> Simms could not prove that similarly situated applicants were treated differently than he was.<sup>143</sup>

The result is two circuits, the Fifth and Eighth, who willingly apply the *McDonnell Douglas* framework to credit discrimination cases. The Seventh

133. *Id.* at 927 (quoting *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 (1977); *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983)).

134. 55 F.3d 991 (5th Cir. 1995).

135. *See id.* at 995.

136. *Id.* (quoting *Kendall v. Block*, 821 F.2d 1142, 1145 (5th Cir. 1987)).

137. 83 F.3d 1546 (5th Cir.), *cert. denied*, 519 U.S. 1041 (1996).

138. *See id.* at 1548-51.

139. For an explanation of redlining, see *supra* notes 37-39 and accompanying text.

140. *Simms*, 83 F.3d at 1551.

141. *See id.* at 1554.

142. *See Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1558 (5th Cir.), *cert. denied*, 519 U.S. 1041 (1996). It is interesting to note that Simms, a white man, passed the first prong on the backs of his minority tenants.

143. *See id.*

Circuit in *Latimore*, however, took a distinctly different approach, refusing to apply the framework where the facts failed to support its use.

*D. Alternative Frameworks for a Prima Facie Credit  
Discrimination Case*

In addition to disparate treatment, plaintiffs can prove their case through two other methods. All three methods are byproducts of employment discrimination jurisprudence under Title VII.<sup>144</sup> The alternative methods include establishing "direct evidence of discrimination" and "the 'effects test' or disparate impact analysis; or the disparate treatment analysis."<sup>145</sup>

Offering "explicit and unambiguous statements of hostility" towards an ECOA-shielded individual is adequate to establish "discrimination without inference or presumption."<sup>146</sup> Rare is the case where direct evidence of this kind is available.<sup>147</sup> Given lenders' sophistication and the general social inappropriateness of racial language, plaintiffs are hard pressed to use this method.<sup>148</sup> However, at least one commentator takes the position that "[w]hile direct evidence of discrimination may be relatively rare in employment discrimination cases, it provides the basis for a substantial number of claims under ECOA."<sup>149</sup>

Absent lenders overtly discriminating against potential borrowers, the outcome of seemingly legitimate policies may still have a negative impact on protected class members.<sup>150</sup> The invidiousness of this impact has pushed

144. See Charlotte E. Thomas, *Defending a Free Standing Equal Credit Opportunity Act Claim*, 114 BANKING L.J. 108, 109 (1997).

145. *Id.*

146. *Id.* (citing *Brown v. East Miss. Elec. Power Ass'n*, 989 F.2d 858, 861-62 (5th Cir. 1993); *Barbano v. Madison County*, 922 F.2d 139, 145 (2d Cir. 1990); *EEOC v. Alton Packaging Corp.*, 901 F.2d 920, 923 (11th Cir. 1990); *de la Cruz v. New York City Human Resources Dep't*, 884 F. Supp. 112, 116 (S.D.N.Y. 1995), *aff'd*, 82 F.3d 16 (2d Cir. 1996), *petition for cert. filed*, (July 10, 1996) (No. 96-5214)).

147. See Schwemm, *supra* note 34, at 328.

148. See Schwemm, *supra* note 34, at 328.

149. Thomas, *supra* note 144, at 110. See also *Moore v. United States Dep't of Agric. on Behalf of Farmers Home Admin.*, 55 F.3d at 995 (5th Cir. 1995) ("[N]o whites can qualify."); *Bhandari v. First Nat'l Bank of Commerce*, 808 F.2d 1082, 1084 (5th Cir.), *reh'g granted*, 812 F.2d 936 (5th Cir. 1987), *cert. granted, vacated*, 492 U.S. 901 (1989) (holding that ECOA does not prohibit discrimination based on alienage) (clerk told applicant that the bank "did not issue credit cards to non-citizens"); *McKenzie v. United States Home Corp.*, 704 F.2d 778, 779 (5th Cir. 1983) (finalized divorce proceedings or deed of trust signed by husband as requirement for lending to woman); *Ricci v. Key Bancshares, Inc.*, 662 F. Supp. 1132, 1140 (D. Me. 1987) (statements that national origin was a basis for different treatment).

150. Stephen Carpenter, *Farm Service Agency Credit Programs and USDA National Appeals Division*, 3 DRAKE J. AGRIC. L. 35, 57-58 (1998).



Congress and the Federal Reserve Board to establish the disparate impact standard for proving an ECOA claim.<sup>151</sup> This test, sounding in employment discrimination law, is a burden-shifting approach.<sup>152</sup> In the employment context, the plaintiff must show that an employment practice, facially fair or neutral, excludes protected class members in its application.<sup>153</sup> Once the plaintiff meets this burden, the burden shifts<sup>154</sup> and the employer must demonstrate that his alleged discriminatory practice enjoys "a manifest relationship to the employment in question" or is a "business necessity."<sup>155</sup> Finally, "[i]f the employer succeeds with its burden at the second stage, the employee must then show there are other reasonable alternatives that would result in a diminished disparate impact."<sup>156</sup>

Obviously, the test is modified to meet the credit context and seems to fit all forms of consumer credit.<sup>157</sup> In practice, however, the stratagem is probably best suited to credit scoring systems which lend themselves to statistical analysis.<sup>158</sup>

#### IV. INSTANT DECISION

Writing for a three judge panel, Judge Posner began his analysis with a brief review of how plaintiffs establish a *prima facie* discrimination case based on the *McDonnell Douglas* standard.<sup>159</sup> In an employment discrimination context, the court established that plaintiffs must show that they belong to a minority group, that they are qualified for the position, and that the employer rejected them.<sup>160</sup> If a plaintiff meets this burden, the shifting discriminatory presumption requires that the defendant show "a noninvidious reason" for not hiring the plaintiff.<sup>161</sup> The parties' invitation to use the *McDonnell Douglas* framework was no surprise

151. Thomas, *supra* note 144, at 110 (citing 15 U.S.C. § 1691 (1994); Equal Credit Opportunity, Reg. B, 12 C.F.R. § 202.1 (1998)).

152. Gwen A. Ashton, *The Equal Credit Opportunity Act From a Civil Rights Perspective: The Disparate Impact Standard*, 17 ANN. REV. BANKING L. 465, 474-75 (1998) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)).

153. *See id.*

154. *See id.*

155. *Id.* (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (citing *McDonnell Douglas*, 711 U.S. at 802)).

156. *Id.* at 475 (quoting *Jenkins v. Wal-Mart Stores, Inc.*, 910 F. Supp. 1399, 1423 (N.D. Iowa 1995)).

157. *See* Thomas, *supra* note 144, at 111.

158. *See* Thomas, *supra* note 144, at 111.

159. *See* *Latimore v. Citibank Fed. Sav. Bank*, 151 F.3d 712, 713-14 (7th Cir. 1998).

160. *See id.*

161. *Id.*

to the court because the presumption had been extended far beyond the labor discrimination field in other decisions.<sup>162</sup>

Next, the court turned its attention to other circuits that had adopted the *McDonnell Douglas* standard. Questioning those courts' reasoning, Judge Posner indicated that they failed to sufficiently explore the reasoning behind the standard before "wholesale transport[ing] . . . [it] to the credit discrimination context."<sup>163</sup> He noted that a reason must exist for shifting the burden from the plaintiff to the defendant.<sup>164</sup> The plaintiff's difficulty in excavating the "essential evidence" that a defendant may hold is an insufficient justification for displacing the burden of production.<sup>165</sup> Noting that this displacement would create a system of pre-complaint discovery, Judge Posner declared that the plaintiff must show "some ground for suspecting that the defendant . . . violated the plaintiff's rights" before shifting the burden to the defendant.<sup>166</sup>

Furthering the analysis, Judge Posner compared and contrasted the employment and credit discrimination contexts. He first noted that in the employment discrimination context, the competitive face-off between the two races "creates the (minimal) suspicion" that discrimination has occurred.<sup>167</sup> He maintained this was not the case in the lending scenario.<sup>168</sup> Judge Posner pointed out that Latimore did not respond to an offer of a fifty-one thousand dollar loan to be given to the most qualified applicant.<sup>169</sup> In fact, if she had applied in a competitive situation and was qualified, *McDonnell Douglas* may have applied.<sup>170</sup> Citing Seventh Circuit and Supreme Court precedent, he observed that *McDonnell Douglas* was unsuitable in situations where no basis existed for comparing the defendant's treatment of the plaintiff with that of other similarly situated persons.<sup>171</sup>

Turning his attention to Citibank's argument, Judge Posner noted the standard which the bank could impose on borrowers.<sup>172</sup> Comparing the standard to the qualification prong in the employment discrimination context, he pointed out that borrowers must meet "the lender's requirements for collateral as well as . . . establish personal creditworthiness."<sup>173</sup>

162. *See id.*

163. *Id.* at 714.

164. *See* Latimore v. Citibank Fed. Sav. Bank, 151 F.3d 712, 714 (7th Cir. 1998).

165. *See id.*

166. *Id.*

167. *Id.*

168. *See id.*

169. *See* Latimore v. Citibank Fed. Sav. Bank, 151 F.3d 712, 714 (7th Cir. 1998).

170. *See id.*

171. *See id.* (citing United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.13 (1973); Diaz v. Fort Wayne Foundry Corp., 131 F.3d 711, 712-13 (7th Cir. 1997)).

172. *See id.*

173. *Id.* (citing Coco v. Elmwood Care, Inc., 128 F.3d 1177, 1179-80 (7th Cir. 1997)).

Returning to Latimore's variant of the *McDonnell Douglas* framework, Judge Posner demonstrated the flaws in her reasoning.<sup>174</sup> Her test could not stand in the face of normal lending requirements.<sup>175</sup> The court stated that the collateral failed to meet the seventy-five percent loan-to-value ratio that is common practice in mortgage lending.<sup>176</sup> The court found "nothing remotely suspicious" about this industry-wide practice.<sup>177</sup> Further, the court observed that appraisal discrepancies were normal and that banks rarely relied on third-party appraisers.<sup>178</sup> In short, the court's discrimination suspicions were not aroused by Citibank's appraisal practices.<sup>179</sup>

Departing from the *McDonnell Douglas* framework, the court entertained the proposition that Latimore could have attempted a conventional showing of discrimination "without relying on any special doctrines of burden-shifting."<sup>180</sup> In response to Latimore's first argument that Citibank's appraisal method was discriminatory, Judge Posner cited the plaintiff's own expert who appraised her property at sixty-two thousand dollars—a figure at which only forty-six thousand dollars would be loaned using the property as collateral, not the fifty-one thousand dollars requested from Citibank.<sup>181</sup> Pointing out that "[r]eal estate appraisal is not an exact science" and that Citibank may use conservative methods to contain interest rates, Judge Posner ruled out any invidious schemes surrounding this argument.<sup>182</sup>

The second prong of Latimore's conventional attack also met with disfavor by the court. Alleging favoritism toward white loan applicants, Latimore contended that Lundberg, the bank's loan officer, went beyond her normal duties to assist white borrowers in meeting appraisal standards.<sup>183</sup> The court rebuffed this contention because the "favoritism" allegedly shown was in the form of suggesting that additional "comparables" be brought to the appraisal review

174. Latimore asked the court to apply the presumption "that her house was in a minority neighborhood, [that] an appraisal estimated the value of the house to be at least as great as the loan, [she] was creditworthy, [and] yet the loan was rejected." *Id.* at 715.

175. See *Latimore v. Citibank Fed. Sav. Bank*, 151 F.3d 712, 714 (7th Cir. 1998). Latimore's test required that "her house was in a minority neighborhood, an appraisal estimated the value of the house to be at least as great as the loan, she was creditworthy, and the loan was rejected." *Id.* at 714-15.

176. See *id.* at 715.

177. *Id.*

178. See *id.*

179. See *id.*

180. *Latimore v. Citibank Fed. Sav. Bank*, 151 F.3d 712, 715 (7th Cir. 1998) (citing *Trans World Airlines, Inc. v. Thurson*, 469 U.S. 111, 121 (1985); *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1399 (7th Cir. 1997); *Hill v. Metropolitan Atlanta Rapid Transit Auth.*, 841 F.2d 1533, 1539 (11th Cir. 1988)).

181. See *id.* at 715.

182. *Id.*

183. See *id.*

department's attention.<sup>184</sup> The court found this encouragement unnecessary because Latimore herself offered additional comparables in the form of her third-party appraisal.<sup>185</sup> Hence, the court determined that Lundberg, by inquiring about the higher appraisal, did for Latimore what she would do for any potential borrower.<sup>186</sup>

The final prong of the plaintiff's conventional attack challenged the disappearance of the appraiser's notes.<sup>187</sup> Federal regulations require retention of these notes for twenty-five months after a lender denies a loan application.<sup>188</sup> In Latimore's case, these notes were lost during the regulated period.<sup>189</sup> While the court agreed that the presumption of adverse evidence is normally created by this loss, Citibank sufficiently explained the loss as inadvertent, and thus prevented the presumption from attaching.<sup>190</sup>

Affirming summary judgment for Citibank, the court reflected on the evidence as favorably as the record permitted.<sup>191</sup> However, the court found that "no reasonable jury could find that [Latimore] was turned down because of her race."<sup>192</sup> The court held that the *McDonnell Douglas* framework is unsuitable for credit discrimination cases because there is "no basis for comparing the defendant's treatment of the plaintiff with the defendant's treatment of other, similarly situated persons."<sup>193</sup>

184. *Id.*

185. *Latimore v. Citibank Fed. Sav. Bank*, 151 F.3d 712, 715 (7th Cir. 1998).

186. *See id.*

187. *See id.* at 716. Latimore named the appraiser, Kernbauer, as a defendant in the case. *Id.*

188. *Id.* (citing Equal Credit Opportunity, Reg. B, 12 C.F.R. § 202.12(b)(1)(i) (1998)).

189. *See id.*

190. *Latimore v. Citibank Fed. Sav. Bank*, 151 F.3d 712, 716 (7th Cir. 1998) (citing 12 C.F.R. §§ 202.12(b)(1)(i), .14(c) (1998); *Favors v. Fisher*, 13 F.3d 1235, 1239 (8th Cir. 1994); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1418-19 (10th Cir. 1987); *S.C. Johnson & Son, Inc. v. Louisville & Nashville R.R. Co.*, 695 F.2d 253, 258-59 (7th Cir. 1982)).

191. *See id.* at 716.

192. *Id.* The court chastised both the plaintiff and her counsel for joining Citibank's appraiser as a defendant. *See id.* The court sternly declared that no evidence supported the contention that this defendant in anyway discriminated in his appraisals. *See id.* In fact, the court found that of sixty-nine minority owned properties appraised, only three—including Latimore's—failed to qualify for the loans. *See id.* However, since Citibank did not ask for sanctions, the court only warned the plaintiff as to her conduct. *See id.*

193. *Id.* at 714.

## V. COMMENT

Judge Posner is, in effect, the first federal appellate judge to critically examine the framework as applied in the credit discrimination context.<sup>194</sup> In both the Fifth and Eighth Circuit decisions, the courts ritualistically applied the *McDonnell Douglas* framework without pausing to establish reasons for doing so.<sup>195</sup> The courts appeared to assume that where no direct evidence of discrimination was available, the framework must apply.

Two possible explanations for the blanket acceptance of the framework instantly surface. First, courts may simply be giving deference to HUD's application of the standard in FHA cases.<sup>196</sup> Second, courts may feel that Congress intends for the Title VII employment discrimination standards to apply to disparate *treatment* credit discrimination cases just as it intended for Title VII to apply in disparate *impact* credit discrimination cases.<sup>197</sup> Unfortunately, while Congress explicitly adopted the *Griggs* standard for disparate impact cases, it has not done so for disparate treatment cases under *McDonnell Douglas*.<sup>198</sup>

Courts that refuse to apply the framework generally do so in three circumstances.<sup>199</sup> First, courts do not substitute *McDonnell Douglas* for a legislatively directed method.<sup>200</sup> Second, the framework is not appropriate when the parties are not similarly situated.<sup>201</sup> Finally, the framework will not apply when plaintiffs have direct proof of discrimination or can prove discrimination under another evidentiary standard.<sup>202</sup>

The Fifth and Eighth Circuits' application of the framework in each instance is on a case-by-case basis where the facts allow.<sup>203</sup> The Seventh

194. Compare *Latimore v. Citibank Fed. Savings Bank*, 151 F.3d 712 (7th Cir. 1998), with *Simms v. First Gibraltar Bank*, 83 F.3d 1546 (5th Cir.), cert. denied, 117 S. Ct. 610 (1996), and *Ring v. First Interstate Mortgage, Inc.*, 984 F.2d 924 (8th Cir. 1993).

195. See generally *Simms*, 83 F.3d at 1546; *Ring*, 984 F.2d at 924.

196. *Ring*, 984 F.2d at 926 n.2.

197. See, e.g., *Simms*, 83 F.3d at 1556 (applying standards from Title VII employment discrimination cases to disparate treatment credit discrimination under the Fair Housing Act).

198. H.R. 6516, 94th Cong. (1975).

199. See *supra* notes 69-121 and accompanying text.

200. See generally *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568 (11th Cir. 1997); *Rouse v. Farmers State Bank*, 866 F. Supp. 1191 (N.D. Iowa 1994); *Jordan v. Clay's Rest Home*, 483 S.E.2d 303 (Va. 1997).

201. See generally *Latimore v. Citibank Fed. Sav. Bank*, 151 F.3d 712 (7th Cir. 1998).

202. See generally *Lauer Farms, Inc. v. Waushara County Bd. of Adjustment*, 986 F. Supp. 544 (E.D. Wis. 1997).

203. See generally *Ring v. First Interstate Mortgage, Inc.*, 984 F.2d 924, 927 (8th Cir. 1993) ("*McDonnell Douglas* . . . analysis varies depending upon the facts or the particular case— thus there is no 'inflexible formulation' that can be defined at the pleading stage of the lawsuit").

Circuit's opinion leaves some room to apply *McDonnell Douglas* where similarly situated non-minority loan applicants are available for comparison.<sup>204</sup> Judge Posner did not expressly foreclose the possibility of using the standard; he merely refused to apply it in *Latimore*.<sup>205</sup> What is unclear is whether the Seventh Circuit will reject all disparate treatment credit discrimination claims under this evidentiary standard or if the facts of Ms. Latimore's case were merely insufficient to warrant its application.<sup>206</sup>

The Fifth and Eighth Circuits instinctively accepted burden-shifting in credit discrimination cases. Both circuits regarded burden-shifting as appropriate when the defendant's evidence was difficult to discover and discrimination was hard to prove.<sup>207</sup> In *Latimore*, the Seventh Circuit critically questioned burden-shifting in such cases.<sup>208</sup> Judge Posner writes:

There has to be a reason for shifting the burden to the defendant. It is not reason enough that essential evidence is in the defendant's possession and would be difficult for the plaintiff . . . to dig out of the defendant . . . . Before the defendant may be put to the burden of producing evidence, the plaintiff has to show that there is some ground for suspecting that the defendant has indeed violated the plaintiff's rights.<sup>209</sup>

Unfortunately, this statement flies in face of the purpose behind the *McDonnell Douglas* framework. The purpose behind the framework is to allow plaintiffs to show discrimination in cases where they lack sufficient access to evidence in

204. See *Latimore*, 151 F.3d at 713-16.

205. See *id.* at 716.

206. See *Latimore v. Citibank Fed. Sav. Bank*, 151 F.3d 712, 713-14 (7th Cir. 1998). Judge Posner cites Bruce L. Hay, *Allocating the Burden of Proof*, 72 IND. L.J. 651 (1997), which questions the validity of burden-shifting regimens in the adversarial system.

207. See *Moore v. United States Dep't of Agric. on Behalf of Farmers Home Admin.*, 55 F.3d. 991, 995 (5th Cir. 1995) ("In the rare situation in which the evidence establishes that an employer openly discriminates against an individual it is not necessary to apply . . . *McDonnell Douglas* to establish an inference of discrimination."); *United States v. Badgett*, 976 F.2d 1176, 1178 (8th Cir. 1992) ("The *McDonnell Douglas* test recognizes that direct proof of unlawful discrimination is rarely available. Therefore, after a plaintiff makes a prima facie case, a presumption of illegality arises and respondent has the burden of articulating a legitimate, non-discriminatory justification . . . .").

208. *Latimore*, 151 F.3d at 714. The burden-shifting conflict in *Latimore*, without question, is the most difficult portion of the decision to reconcile with other federal appellate courts. A study of burden shifting is, obviously, beyond the scope of this Note, but needless to say Judge Posner's statements certainly muddy the waters of many burden-shifting doctrines in the Seventh Circuit.

209. *Id.*

the defendant's possession.<sup>210</sup> Given plaintiffs' protected status, discrimination is presumed.<sup>211</sup> Further, the burden shifted to the defendant is "exceedingly light."<sup>212</sup> The proposition that the defending lending institution's counsel cannot offer a defensible explanation for disapproving the application defies reality. As Judge Chin pointed out, "clever men may easily conceal their motivations."<sup>213</sup>

Beyond simply avoiding the issue and using an alternative method for proving a discrimination case as noted above,<sup>214</sup> this Author offers two potential solutions to resolve the split of authority: one solution comes from outside the judiciary and the other comes from within. First, Congress, or in its stead the Federal Reserve, should offer legislation or regulations directing the burden of proof in disparate treatment cases just as they have done in Regulation B for disparate impact situations.<sup>215</sup> Congress and the Federal Reserve are well equipped to conduct the type of study and analysis required to consider the impact of FHA and ECOA credit discrimination prohibitions from their inception. Further, they are the most capable of forming policies that would address lingering problems yet to be resolved.

Second, the Supreme Court, in the face of congressional or executive inaction, should review a disparate treatment credit discrimination case. An appropriate finding would be to shoot the gap in the circuit split and to allow the *McDonnell Douglas* framework to apply where the facts support its use and similarly situated parties are available for comparison. However, the Court should not "jam" every possible credit discrimination case into this mold when all cases simply will not fit.

## VI. CONCLUSION

Even the optimist would agree that while credit discrimination may be unintentional, it pervades all types of lending. Statistics show that home lending discrimination is widespread. However, the statistics fail to show the effects of the discrimination. Unequal access to credit prevents minority individuals from realizing many of the fruits of liberty—home ownership, education, and business ownership. Until Congress or the Supreme Court acts to clarify standards under

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210. *Lapsley v. Columbia Univ. College of Physicians & Surgeons*, 999 F. Supp. 506, 514 (S.D.N.Y. 1998). "As originally conceived, the *McDonnell Douglas* formula was intended 'progressively to sharpen the inquiry into the elusive factual question of intentional discrimination.'" *Id.* (quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256 n.8 (1981)).

211. *See Lapsley*, 999 F. Supp. at 514-16.

212. *Batey v. Stone*, 24 F.3d 1330, 1134 (11th Cir. 1994).

213. *Lapsley*, 999 F. Supp. at 516 (quoting *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1043 (2d Cir. 1979)).

214. *See supra* Section III.

215. *See Equal Credit Opportunity, Reg. B*, 12 C.F.R. § 202.1 (1998).

statutes such as the FHA and ECOA, many potential minority borrowers will continue to face the unsurmountable wall—full functional membership in American society.

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